



In The Supreme Court of Bermuda

DIVORCE JURISDICTION

2014: No. 123

BETWEEN:

E

Petitioner

-and-

K

Respondent

Dates of Hearing: 8 and 9 June 2015

Date of Judgment: 20 January 2016

MacLellan & Associates – Jackie MacLellan for the Petitioner (husband)

Marshall Diel & Myers – Adam Richards for the Respondent (wife)

JUDGMENT

The Parties

1. The parties in this matter are the husband (Petitioner) and the wife (Respondent), so-called even though they are divorced.
2. The parties married in March 2014, their son ‘child A’ was born on 29 April 2014, and they separated at the end of May 2014. On 29 August 2014 decree nisi was granted; it was made absolute on 13 November 2014.
3. The husband is a 38-year-old Bermudian citizen. He is a police officer.
4. The wife is a 25-year-old US citizen. She is an unemployed student.

The Application

5. In an application for ancillary relief dated 3 September 2014, the wife seeks orders that the husband pay her a lump sum, child maintenance and spousal maintenance.

Evidence considered by the Court

6. Pursuant to this application the parties swore and filed three supporting affidavits: the wife filed two, and the husband filed one.
7. The Court also heard oral evidence from both parties.

Background

Child A custody and removal hearing

8. The history and background to this matter is comprehensively covered in the judgment of this court dated 31 March 2015, and the Court’s order dated 12 April 2015.
9. On 31 March 2015, after a four-day contested hearing on competing applications for care and control of child A, the Court granted the Respondent (wife) sole custody, care and control of child A. The Court also granted the wife leave to remove child A permanently from the jurisdiction to live with her in Massachusetts USA at her parents’ residence. The

Petitioner (husband) was granted defined access which included visits to see the child in the USA.

Hearing and delay in this matter

10. The Court will outline the journey of these proceedings – and the delay in rendering its decision – as these affect whether the Court’s final order will be made retrospective.
11. In June 2015 the Court heard evidence in this matter. On the final day of the hearing, the Court and each party’s counsel agreed that the matter would be adjourned, and that each counsel would provide written submissions within three weeks.
12. In late August/early September 2015, Counsel for the Petitioner and Counsel for the Respondent were before the Court. When the Court enquired about the written submissions, they indicated that they had filed their submissions in the Registry, but they undertook to re-send the submissions.
13. For most of September 2015 the Court was on recess. After the Court resumed in October 2015, it had to relocate office and deal with urgent judicial matters such as the needs of Bermuda’s new Integrated Family Court, these factors contributed to a further delay in rendering a judgment in this case.

Respondent’s (wife’s) submission

14. Counsel for the wife, Mr Richards, explains that the wife is seeking a lump sum, child maintenance and spousal maintenance.

Lump sum

15. Regarding the lump sum, the wife seeks an amount that consists of:
 - a. *Repayment of expenses incurred by the wife following the [parties’] separation prior to the court making an interim maintenance order.*
 - b. *Repayment of the hospital bill for the birth not covered by insurance.*
 - c. *Payment of the bill for the OB-GYN [Dr Woods], which is outstanding.*
 - d. *Health insurance costs, not covered by the husband and not included in the calculations for interim maintenance in the sum of \$580.05 per month from April through to September.*
 - e. *Repayment of certain expenses incurred following the court granting the parties shared care and control, when the wife was required to buy essentials for [child A] which the husband refused to provide.*

16. Mr Richards maintains that some of the expenses included in the lump sum were incurred as a result of the husband's improper behaviour after the birth of child A.

On 11 May 2014, 12 days after the birth of the child, the husband told the wife to leave the matrimonial home. The wife and her mother were therefore required to find suitable guesthouse accommodation. The husband did not provide any funds to secure transportation or meet any of the wife's expenses as a consequence of her moving out of the matrimonial home.

On 15 May, the wife moved back into the matrimonial home. The husband asked the maternal grandmother to remain in Bermuda to assist with the care of child A so that the parties could work on their relationship. Mr Richards argues that as a result:

... certain expenses were incurred by the wife's mother for the benefit of the child which need to be reimbursed. ... even if it was not agreed between the husband and [the wife's] mother that those expenses were to be repaid by the husband ... there was an implied understanding that as the assistance was being provided for [child A] that those costs would need to be met by the husband and the wife.

Certainly, the wife's evidence is that her parents have kept a meticulous record of the expenses incurred by them on their daughter's behalf and that the wife will be required to repay her parents in time.

The wife contends that all the costs incurred by her and her mother during this period ought to be reimbursed, as the husband provided no financial assistance throughout the period. She maintains that the portion which relates to her mother was incurred for the benefit of child A, with the express or implied agreement of the husband, and should be reimbursed.

Mr Richards continues:

Certainly by 22nd May 2014, the parties had separated physically and the wife was left to provide for her own needs and the needs of [child A] without any assistance from the husband.

...

The costs ... relate only to expenses incurred up to and including the variation of maintenance proceedings, i.e. the 8th August 2014, when the wife was left without any funds from the husband to provide for her own expenses.

The wife states that the expenses incurred during the period up to and including 8 August 2014 total \$15,147.54.

17. In addition to the above sum, the wife seeks reimbursement of:
- a) \$548.35 incurred to purchase additional items for child A following the order for shared care and control;
 - b) \$1,500 to cover the period from 8 August to 3 September 2014 as the Assistant Registrar only backdated the maintenance payment to 3 September (the date of the application);

- c) \$3,480.30 in insurance costs due to the husband's failure to provide health insurance, despite his evidence that he had done so. The wife has had to continue to be insured on her parents' health insurance policy which costs \$580.05 per month. The wife seeks reimbursement of \$3,480.30 ('six months' at \$580.05 per month) to cover the period from the date of child A's birth in April to the date of the Registrar's interim maintenance order in September.
- d) \$5,970 in unpaid medical bills to the OB/GYN doctor. Mr Richards states that this can be paid by the husband, or to the wife 'conditional upon her making payment of the outstanding bill'. After receipt of payment is confirmed, the wife's parents would seek reimbursement from their insurance company and repay this to the husband.
- e) \$1,268.33 for the shortfall of the uninsured portion of the wife's hospital stay after the birth of child A.
- f) \$938.56 'for those sums held back by the husband from her interim maintenance payments'. This consists of: \$448 for Belco; \$70 (for cablevision) and \$65.90 (for internet) held back for the period September and October 2014; \$108.15 and \$194.06 for water; \$50 from February's maintenance for co-payments made to child A's doctor.

18. In total, the wife seeks a lump sum of \$28,853.08.

19. With regards to the outstanding OB/GYN medical bill, Mr Richards states that the wife remained on her parents' medical insurance but their policy requires all payments be made 'up front and then reimbursement is sought from the insurance company'.

He continues:

The clear position is that the husband has met these expenses from his income and that the wife's parents have sought to obtain reimbursement from the insurance company. The only reason this did not occur at the hospital was because the husband said he could not afford to do so and it is submitted on his own account he agreed for his wife's parents to loan him the money.

Child maintenance

20. The wife seeks:

... a reasonable sum for child maintenance in relation to [child A]. That sum does not include any contribution towards providing [child A] with a home (by way of rent or contribution to the utility bills) as such costs are met by the wife's parents in accordance with her evidence at the hearing.

Spousal maintenance

21. The wife seeks:

... a very modest sum for her own maintenance to assist her with providing for the care of [child A]. In addition, the wife seeks modest sums for clothing, hygiene and contact lens[es]. In essence, the wife seeks for the husband to contribute towards her essential expenses only. The wife does not include in her claim any element for travel, entertainment or food.

Petitioner's (husband's) submission

22. In the husband's written submission Mrs MacLellan, Counsel for the husband, asserts:

... there are essentially three (3) main issues in dispute:

- a. The level of maintenance for the child of the family if any.*
- b. The level of spousal support, if any, and for how long.*
- c. The amount of lump sum payment to the Respondent, if any.*

23. Mrs MacLellan casts doubt on the credibility of the wife's evidence. The wife committed perjury: she lied when she told the Court that she was unaware when her parents would come to Bermuda. At the time, her parents were already in Bermuda and had left the child in the USA. Upon advice of her counsel, the wife returned to the stand; she was re-sworn and admitted that she had lied and that her parents were in Bermuda.

Mrs MacLellan submits therefore that whenever there is a conflict in the evidence, the husband's evidence should be preferred as the wife 'was perfectly willing and clearly comfortable committing perjury and thereby lying under oath...'.

24. Referring to *US v SR* [2014] EWHC 175 (FAM) Mrs MacLellan stressed:

The known deceptions of the [wife] leaves the court, necessarily and conclusively having to draw adverse inference [from] the conduct and behavior of the [wife].

Lump sum

25. Regarding the lump sum sought, Mrs MacLellan argues:

The [wife] at all times, except for four days, resided at the two-bedroom apartment with the rent being paid for by the [husband], along with her electricity, water, cellphone, cable expenses, internet expenses being paid by the [husband]. The [husband] did not vacate the matrimonial home until the end of May 2014 and it is submitted that all expenses for May be disregarded. Further the Court Order dated 28th October 2014 provided for maintenance for the [wife] and [child A] to be backdated to include September and October 2014 at the rate of \$1,500 per month. Therefore the expenses listed ... for

September should be disregarded. This would leave a total of \$2,291.55 for the three-month period or \$763.85 per month.

She continues:

... the expenses listed for May should be disregard[ed] as should the airline fee to send the cat to Massachusetts as well as changing the lock, which were all unnecessary expenses and without the [husband's] consent, which would reduce that figure to \$871.44 which divided by a three-month period is \$290.48 per month.

The transportation expenses [after] deduction for September and May amounts to \$140 which if one divides over a three-month period is \$46.66.

... the outrageous expenses for eating out at restaurants which clearly include more individuals than just the [wife] and child should be disregarded ...

While the [husband] did ask the [wife's] mother to stay on for a few days to assist her daughter he did not ask for her to stay for a full year which she decided to do on her [own] accord. In addition, the [husband] made no promises to the [wife's] mother that he would be responsible for the expenses which she was going to incur in Bermuda.

26. Adding up the above reduced amounts, Mrs MacLellan submits that for June, July and August 2014, the husband:

... should pay the sum of \$1,100.99. At the very most, given that the Registrar considered that the sum of \$1,500 per month would suffice for the [wife's] expenses, [the husband should pay] no more than \$1,500 for the months of June, July and August 2014. The [husband] would need to pay this in the amount of \$300 per month once the arrears of maintenance for September and October are paid.

27. With regards to the medical bills, Mrs MacLellan asserts that the husband and the wife should share the hospital bill shortfall of \$1286.33 equally.

However, as the OB/GYN bill is in the wife's name and her health insurance is in the USA, the wife can 'borrow the money from her father to pay the OB/GYN and get reimbursed through her health insurance'.

28. With regards to the husband's deductions from the payments due to the wife under the interim maintenance order, Mrs MacLellan argues:

At the interim maintenance hearing, the [Assistant] Registrar indicated that the \$1,500 per month included all expenses excluding the rent and the electricity, and that the [wife] should put all other bills such as cable, internet and so on in her name. In light of this, it was entirely reasonable for the [husband] to deduct these expenses which he had already paid from the maintenance for September and October 2014.

Child maintenance

29. Mrs MacLellan argues that some of the expenses listed for child A as ‘month-to-month’ will not actually be incurred monthly. However, the only expense the husband takes issue with is ‘the need to buy plum organic baby food at a cost of \$304.20 per month’, instead ‘the baby food amount should be decreased to \$100 per month’.
30. The husband has no problem with the annual clothing costs for child A, but the wife should provide clothing for the child for the husband’s access visits.
31. Overall, the husband is prepared to pay \$450 per month for child A’s expenses.
32. Mrs MacLellan further submits that the currency for the maintenance payment should be Bermuda dollars as ‘the [husband] is paid in Bermuda dollars and it was the [wife’s] decision to leave to live in the United States ... [the wife] should [also] bear the conversion fee and associated costs’.

Spousal maintenance

33. With regard to the wife’s income and earning expectations, Mrs MacLellan states that the wife submitted that she had to complete a summer component for her current two-year college programme, and that afterwards she would start a two-year university programme. The wife gave ‘evidence that at the conclusion of the program she expected to obtain a good paying job’.
34. Mrs MacLellan reiterates:

The [wife] indicated that while she could work part-time while she was completing the program, she did not think that this would be worth it as the cost of gas to get to a part-time minimum-wage-paying job would offset any monies which she earned.

However, Mrs MacLellan argues that as the wife is taking online courses which can be completed at any time, and she is living at home with the support of her mother, the wife ‘should be expected to work part-time and an income [should be] attributed to her’.

35. Additionally, in her application for care and control of child A, the wife’s evidence was that she would reside with the child at her parents’ home. Her father would lend her money to pay for all her expenses and she would reimburse him after she had completed her training and obtained full-time employment. The wife further indicated that her father would not lend her money to remain living in Bermuda because Bermuda was too expensive.

Mrs MacLellan maintains that given this, and the fact that the parties were only married for six months, ‘it would seem very unfair that the [husband] be required to fund the [wife’s] expenses...’.

36. Mrs MacLellan then discusses the various expenses listed by the wife including car, dental, eye doctor and clothing. She asserts that these are high and/or excessive.

In particular, Mrs MacLellan submits that the husband ‘should not be required to pay for a car lease for the [wife] or the other car-related expenses listed...’.

Most of the wife’s courses are online, her father drives a company truck, and her mother has a car but does not work. Mrs MacLellan argues that ‘it is entirely reasonable to expect’ that the wife could borrow her mother’s car should she need to. Also:

It is unreasonable for the [wife] to expect the [husband] to pay for a car for her, when he is having to rent a car when he visits [child A]. In addition, the [wife] was vehement in saying that the [husband] could not borrow the car.

37. As regards the health insurance cost, Mrs MacLellan argues that the wife’s evidence is ‘entirely unsatisfactory and unclear as to the proportionate cost for the [wife] and the child’. The wife was asked to provide documentary proof ‘to clarify the cost of healthcare for herself and [child A] and has failed to do so’.

Mrs MacLellan maintains that if the husband paid the proportion of health insurance ‘suggested by the [wife] (split in 4), he would in fact be subsidizing the [wife’s] parents’ health insurance’.

38. Mrs MacLellan concludes that aside from child support of \$450 per month, the husband only needs to pay ‘\$1,100.99 [per month] for maintenance for June, July and August 2014 payable in \$300 monthly installments’. She reiterates that the ‘parties should share any shortfall in medical costs not covered by insurance’.

The Court

39. The Court has taken into account the authorities cited by each counsel, and all the evidence before it in arriving at this decision. Although it has not restated all the facts, it has highlighted the relevant facts needed to make this decision comprehensible.

Lump sum payment

40. The wife seeks a lump sum amount of \$28,853.08 to cover:

1. *Expenses up to and including 8 August 2014*
2. *Basic items purchased for Aidan when shared care and control was implemented*
3. *Maintenance for the period not covered from 8 August 2014 to 3 September 2014*
4. *Unpaid health insurance for the period up to the date of the interim maintenance hearing*
5. *Shortfall in the hospital bill not covered by insurance*
6. *Dr Wood's (Ob-Gyn) bill*
7. *Expenses deducted from the interim maintenance payment*

41. The arguments from each counsel regarding the lump sum amount have already been outlined. The Court will therefore deal with each issue as listed above.

42. Counsel for the wife submits that the expenses incurred by the wife during the parties' separation, from May 2014 up to and including 8 August 2014, total \$15,147.54.

Given the level and the nature of some of these expenses, the Court finds that it is unreasonable for the wife to require the husband to pay the reimbursement being sought. Instead, the husband is to pay maintenance for June, July and August 2014 (see paragraph 44 of this judgment).

43. The wife is claiming \$548.35 for items purchased for child A when the parties had shared care and control of the child. This amount of \$548.35 is allowed. In the Court's view, the husband should have ensured child A had adequate clothing and supplies when leaving the child with the wife.

44. Regarding maintenance for the period from 8 August to 3 September 2014, the Court notes that in his 28 October 2014 maintenance order, the Assistant Registrar backdated the order to 3 September 2014 (the date of the application). The wife now seeks maintenance for a period for which no maintenance was ordered.

Given the history leading up to this application, the Court would not normally allow any maintenance for this gap. The Assistant Registrar could not have backdated the order to a

date prior to the date of the application unless he had received a request to do so. The wife's argument seeking expenses for this period ought properly to have been raised before the Assistant Registrar. If the wife was unhappy with the Assistant Registrar's decision, then that decision could have been the subject of an appeal.

Having said that, in his written submission, the husband conceded that he is prepared to pay the wife \$1,100.99 per month, or no more than \$1,500 per month for June, July and August 2014 if the Court so orders.

The amount of \$1,500 is one that the Assistant Registrar considered reasonable in his maintenance order, and the Court concurs.

In these circumstances, the Court therefore orders the husband to pay maintenance of \$1,500 per month for June, July and August 2014 such that the husband is to pay the wife \$4,500 total. This can be paid in arrears at the rate of \$300 per month, after the husband has paid off any arrears he currently owes for September and October 2014.

45. Counsel for the wife submits that the interim maintenance order did not deal with the wife's on-going health insurance expenses. The husband failed to insure the wife despite claiming that he had done so, consequently the wife was required to continue to be insured on her parents' health insurance policy at \$580.05 per month. The wife seeks \$3,480.30, which is 'six months' of repayment at \$580.05 per month.

The Court has reviewed the available evidence and it is in doubt as to the correct proportionate insurance costs for the wife and child A.

Additionally, the Court notes that during the removal and custody hearing, the wife's parents vowed to assist her financially. Also, the parties had agreed that during her pregnancy the wife would remain on her parents' policy. It is not unreasonable to ask that child A be added to the family plan; doing so should be a minimal increase on the family insurance cost.

The claim for \$3,480.30 is refused.

46. The wife is claiming \$1,268.33 for the unpaid medical bills from her hospital stay. She is also claiming \$5,970 owed to the OB/GYN Dr Woods.

The wife remained on her parent's health insurance so that she could be covered during her pregnancy. That policy requires all medical expenses be paid upfront, before reimbursement is sought from the insurance company.

The spirit of the policy is really to ensure that youngsters who are not working and who are in full-time education do not go uninsured. The wife's parents have no obligation to pay the OB/GYN bill.

However, the wife's parents are prepared to issue a claim for reimbursement upon receipt of evidence confirming that the OB/GYN bill has been paid. After they receive reimbursement from their insurance company they will repay the husband.

Normally the Court would order each parent to bear 50 per cent of the cost, but the wife is unemployed. The Court finds that the husband should pay the uninsured portion of \$1,268.33 for the wife's hospital stay. The husband should also pay the OB/GYN bill, and he is responsible for any uninsured portion of that bill.

The Court cannot accept an undertaking from the wife's parents. However, the wife is hereby ordered that after she receives confirmation that the OB/GYN bill has been paid, she will ensure that reimbursement is sought from the insurance company and that this money is paid back to the husband.

47. And lastly, as part of the lump sum amount, the wife seeks reimbursement of the sums held back by the husband from the interim maintenance payment. The husband deducted a total of \$938.56 from the wife's maintenance without authority. He only ceased when the Registrar ordered on application that no such further deductions should be made.

The Court finds that the wife should be reimbursed the \$938.56.

Child maintenance

48. The Court has taken into account the guiding principles of section 29 of the Matrimonial Causes Act 1974. The Court has also given consideration to the welfare of child A who is under the primary care of the wife.

49. In so far as maintenance for child A is concerned, the evidence provided by the parties (including the list of expenses set out by wife in her affidavit and her written submission): the Court rejects some of these expenses as unreasonable. Also, the evidence regarding the insurance cost leaves the Court in doubt as to the actual cost.

50. The husband proposes that he should pay \$450 per month for child A's maintenance. The wife proposes that the sum should be \$1,077.45 per month.

51. The Court bears in mind that both parents have a responsibility to take care of the child financially. It looks at the reasonable requirements of child A and, taking into account all the factors, the order of \$1,500 per month is hereby discontinued.

52. Starting 3 December 2015, the husband is to pay \$800 per month in maintenance for child A unless and until otherwise ordered by the Court.

The retrospective start date of the third day of the month is, for convenience, in keeping with the monthly payment date set by the Assistant Registrar in his 28 October 2014 maintenance order. The December 2015 start reflects the Court's discretion to make payments retrospective in the context of the delay in rendering this decision.

53. In the Court's judgment maintenance of \$800 per month for child A is sufficient for the wife to subsidise any personal or other needs of child A that arise from her care of the child.

54. During the husband's access visits to maintain contact with child A, the wife is to ensure that the child is adequately clothed and that the husband is provided with reasonable supplies that the child is likely to need when he is in the husband's custody.

Spousal maintenance

55. The Court should state that unfortunately, throughout this hearing, the wife did not make a favourable impression. The Court did not find her to be credible: she deliberately lied under oath although she corrected this later on in her testimony.
56. Before looking at the maintenance that the wife is seeking, it is worth recalling that in this Court's 31 March 2015 judgment – granting the wife sole custody, care and control of child A, and permission to relocate him to the USA – the wife had asserted that her parents could afford to support her financially.

In the 31 March judgment, the Court applied test principles from Mostyn J in *TC and JC* (Children: Relocation) [2013] EWHC 292 (Fam). One of the test principles was: 'Is the [parent's] application realistically founded on practical proposals both well-researched and investigated?', and at paragraph 100, this Court found:

100. The mother set out her plans for studying and being available for the child during his formative years. After completion of her studies she expects to obtain a well-paying job to provide for herself and the child. She is not permitted to work in Bermuda unless she gets an extension of her spousal employment rights certificate.

When she returns to the USA, she plans to stay with her parents while she finishes her online degree course. ...

Her parents are able to accommodate her and the child in the USA. They are able to afford to accommodate her financially and the parent's property will allow the child to enjoy outdoors experiences. Her parents have indicated that they are committed to assist her.

The father's plans for care of the child are not as clearly defined as the mother's. In his written submission he simply refers to assistance from his mother and family with day care as an option when the child is old enough.

The Court finds the father's proposal is neither practical nor well-researched.

...

Further, applying welfare test principles from the Children Act 1989, the Court was satisfied after considering the evidence in respect of child A's physical, emotional and educational needs that:

107. ... both parents can see to the child's needs but the mother's case is much stronger as she has stated how she (and her parents) can provide financial security as well as a family support network for the child.

57. The Court has taken a broad approach to the parties' budgets and does not propose to carry out any further detailed analysis of these. The wife has put forward a budget in which she claims \$2,415.37 per month in maintenance for herself and child A (\$1,077.45 for child A and \$1,337.92 for herself). The wife's list of expenses includes a cell phone bill, car lease, her proportion of the health insurance, medical co-payments, contact lenses, feminine hygiene items, prescription glasses, and clothing. The wife says these expenses are modest and designed to provide purely for the basic needs of child A and herself.
58. The Court accepts that the wife is not yet in a position to secure full-time employment and that she has no income from employment. The Court does not know the wife's income from her parents. The Court finds the husband's income to be not less than \$7,630.21 per month. The husband also bears the full brunt of the expense in maintaining contact with child A. The parties were married for less than six months, and neither party has any property.
59. Given all these circumstances, the Court refuses to grant the wife significant maintenance.
60. The Court is not empowered to dismiss the wife's claim for periodical payments. Accordingly, the Court hereby makes a nominal order for spousal maintenance of \$1 per month for three years. Payments are to be backdated to 3 December 2015; the same retrospective date for the start of the new child maintenance payments.

Addendum: parenting evaluation report

61. In reviewing this matter the Court is reminded that paragraph 110(g) of its 31 March 2015 judgment has not been satisfied.

After ordering that the mother (the wife) 'obtain counselling and (if necessary) appropriate medication to help her manage her moods and identified mental health challenges', the Court ordered:

110. ...

(g) That – to ensure the continued wellbeing and welfare of child A remains paramount – the mother undergo a parenting evaluation by a trained psychologist within 6–9 months of the date of this order.

It is in the best interests of the child that the Court is provided with this parenting evaluation report. It is hereby ordered that this evaluation report be provided to the Court within one month of the date of this judgment. (The parties have liberty to apply in respect of this aspect of the order.)

Closing remarks

62. All payments are to be made in Bermudian dollars, and the wife is to pay any required conversion fees.

63. Each party is to bear their own cost of these proceedings.

64. The Court invites the parties to agree an order for the Court's approval.

Dated ____ day of January 2016

Justice Norma Wade-Miller
Puisne Judge